

No. 24-429 & No. 24-433

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION, ET AL., *PETITIONERS*

v.

NATIONAL HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION, ET AL., *RESPONDENTS*

HORSERACING INTEGRITY AND SAFETY AUTHORITY,
INCORPORATED, ET AL., *PETITIONERS*

v.

NATIONAL HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION, ET AL., *RESPONDENTS*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF THE NHBPA

DANIEL R. SUHR
Counsel of Record
Center for
American Rights
747 N. LaSalle St. #210
Chicago, IL 60654
414.588.1658
dsuhr@
americanrights.org

*Counsel for
Respondents NHBPA
and its Affiliates*

CHRISTOPHER E. MILLS
Spero Law LLC
Charleston, SC

FERNANDO M. BUSTOS
Bustos Law Firm, P.C.
Lubbock, TX

PETER ECABERT
National HBPA
Lexington, KY

Throughout the horseracing cases, the Horseracing Integrity and Safety Authority (HISA) and Federal Trade Commission have—forgive the pun—beaten a dead horse over and over again: that HISA is just like FINRA, and FINRA is obviously constitutional. *See, e.g.,* Horseracing Authority Petition for Certiorari, No. 24-433, at 1-2 (“That arrangement is modeled on the effective framework—*uniformly upheld by the courts*—that has governed the relationship between the Financial Industry Regulatory Authority (‘FINRA’) and the Securities and Exchange Commission (‘SEC’) for 85 years.”) (emphasis added)).

No longer is that second proposition true.

A unanimous panel of the U.S. Court of Appeals for the D.C. Circuit has held that FINRA violates the private non-delegation doctrine in its exercise of unchecked enforcement power over those it regulates. *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 2024 U.S. App. LEXIS 29728 (D.C. Cir. Nov. 22, 2024). This opinion deepens the circuit split between the Fifth Circuit’s constitutionalist approach and the lackadaisical approach to enforcement oversight by the Sixth and Eighth Circuits, further demanding this Court’s attention.

As the D.C. Circuit opinion by Judge Patricia Millett, joined by Chief Judge Sri Srinivasan, recognized, “For a delegation of governmental authority to a private entity to be constitutional, the private entity must act only ‘as an aid’ to an accountable government agency that retains the ultimate authority to ‘approve[], disapprove[], or

modif[y]’ the private entity’s actions and decisions on delegated matters.” *Id.* at *20 (citations omitted).

The D.C. Circuit held that FINRA fails this test:

Alpine has shown, on the record before us, that the SEC does not exercise ultimate control over FINRA’s decisions to expel its members in expedited proceedings because those orders take effect immediately, before the SEC can review them, and the severe consequences associated with expulsion can make any later review by the SEC a largely academic exercise.

Id. at *21. The court explained that “delayed SEC review of expulsion orders will almost always be too little too late.” *Id.* at *22. The consequences of expulsion are immediate and devastating: “Barred from pursuing their trade, many expelled FINRA members could be forced out of business before they can obtain SEC review of the merits of FINRA’s decision.” *Id.*

The same is true under the rules of the Horseracing Authority. The Horseracing Authority has the power to provisionally suspend a racetrack from hosting races (Auth. R. 2117); to place a horse on the Veterinarian’s List, which prevents it from racing (Auth. R. 2240); and to provisionally suspend any person from owning, training, riding, or treating a covered horse (Auth. R. 2287). Review by the Federal Trade Commission only comes after a final imposition of civil sanctions by the Authority, which occurs many months later, if at all. 15 U.S.C. § 3058(a).

That the SEC can eventually impose a stay of the order is no solution, *Alpine Sec. Corp.*, 2024 U.S. App.

LEXIS 29728, at *22-23, because such a stay takes time to request and is not “easily obtained.” *Id.* at *22-24. The same problem exists for the FTC and HISA. 15 U.S.C. § 3058(d).

The effect of provisional suspension on horsemen is also similar to the effect on securities dealers. According to the D.C. Circuit, “[i]t is not realistic to expect that Alpine, choked of any income or business from securities trading, could simply reopen its doors months, if not years, after FINRA locked them shut.” *Alpine Sec. Corp.*, 2024 U.S. App. LEXIS 29728, at *30. Likewise, a horseman who is suspended for months awaiting final resolution of his case, stripped of all his horses and his ability to race in any HISA-regulated state, will face devastating financial consequences that force him out of the industry entirely, even if someday the FTC may vindicate his appeal.

The D.C. Circuit summarized: “The result of this regulatory scheme is that FINRA can, without any SEC review of its decision on the merits, effectively decide who can trade securities under federal law.” *Id.* at *25. So too the Authority effectively decides who can race horses under federal law.

Judge Justin Walker, in an opinion concurring in part in the judgment and dissenting in part, explained further that “FINRA wields significant executive authority when it investigates, prosecutes, and initially adjudicates allegations against a company required by law to put itself at FINRA’s mercy. That type of executive power can be exercised only by the President (accountable to the nation) and his executive officers (accountable to him).” *Id.* at *51.

He reiterated a “bedrock principle:” “the government must not delegate significant executive authority to private actors.” *Id.* at *56. He continued, “Even worse than an interbranch delegation is an extrabran­ch delegation — the ‘most obnoxious form’ of delegation.” *Id.* at *58.

His entire opinion, from *56 to *63, is a point-by-point refutation of FINRA’s constitutionality that resonates with Judge Kyle Duncan’s opinion for the Fifth Circuit. *See esp.* n.36 (comparing FINRA to Judge Duncan’s discussion of HISA’s enforcement authority); n.70 (comparing FINRA to Judge Duncan’s discussion of FTC’s stay authority); and n.71 (comparing FINRA to Judge Duncan’s discussion of HISA’s discipline settlement authority).

The opinions of Judge Millett and Judge Walker both underline the importance of this question: may Congress delegate sovereign investigatory and enforcement power over an entire industry to a private actor, and if so, what level of supervision or accountability from a government actor is necessary? The D.C. Circuit has joined the Fifth Circuit in insisting on meaningful and timely review of enforcement decisions, while the Sixth and Eighth Circuits have taken a more hands-off approach. The difference demands this Court’s attention as now two important industries look for resolution of pressing questions about their regulatory frameworks.

The Court should grant certiorari.

Respectfully submitted,

DANIEL R. SUHR
Counsel of Record
Center for
American Rights
747 N. LaSalle St. #210
Chicago, IL 60654
414.588.1658
dsuhr@
americanrights.org

CHRISTOPHER E. MILLS
Spero Law LLC
Charleston, SC

FERNANDO M. BUSTOS
Bustos Law Firm, P.C.
Lubbock, TX

PETER ECABERT
National HBPA
Lexington, KY

*Counsel for Respondents
the National HBPA and its affiliates*

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